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No. 82-434

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NORTHERN UTILITIES, INC., a Wyoming corporation,
Petitioner,

v.

KERR-McGEE CORPORATION, a Delaware corporation,
Respondent.

NORTHERN UTILITIES, INC., a Wyoming corporation,
Petitioner,

v.

AMOCO PRODUCTION COMPANY, a Delaware corporation and PHILLIPS PETROLEUM COMPANY, a Delaware corporation.
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY OF NORTHERN UTILITIES, INC. TO BRIEFS IN OPPOSITION TO PETITION FOR CERTIORARI

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The presentations of arguments in the briefs opposing the petition of Northern Utilities, Inc. for a writ of certiorari are efforts to obscure what this case is all about and gloss over the unusual circumstances which caused the district court to conclude that the third-party favored

nations clause in the producers' gas sales contracts was void as against public policy and unconscionable when made. The failure of the court of appeals to understand these circumstances has resulted in a decision which calls for the exercise by this Court of its power of supervision through the grant of a writ of certiorari.

1. *Uniqueness.* Amoco contends that Article 6(b) is an example of a "common" clause[1], and in any event, Kerr-McGee and Phillips complain that "[t]he Petition fails to explain why uniqueness is relevant to unconscionability"[2]. Clauses generically denominated "favored nations clauses" may be common, but Article 6(b) most decidedly is not. The district court found that "Clause 6(b) is *not* a standard clause of common use in the industry, but is a unique provision. Arles H. Barrett, of Amoco, testified that he knows of no other contract containing this clause"[3]. Mr. Barrett, the Amoco representative who conceived of the clause and under whose direction it was drafted, testified that the distinguishing feature rendering it unique is that "[v]ery often third party Favored Nations provisions do have some limitations", but that Article 6(b) does not.[4]

The unconscionable reach of the clause can not be dismissed by rationalizing that it is a common and necessary incident of natural gas contracts. The indefiniteness of Article 6(b) admits of no adjustment for even such fundamental differences as measurement factors. No court

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[1] Amoco Brief, p. 2.

[2] Kerr-McGee and Phillips Brief, p. 9, footnote 8.

[3] Finding 15, Petition, p. 26(a) (emphasis added).

[4] Tr. 231.

of law or conscience has enforced such a bargain. The absence of a pressure base adjustment effectively permits the producers to apply a third party's price per gallon to a contract whose unit of sale is a quart. The absence of a Btu adjustment enables the producers to charge the price received by a third party seller of gas rich in heating value, despite that the producers here, in fact, process Beaver Creek gas to remove the high Btu components of the naturally occurring gas before delivery to Northern. Similarly, the indefiniteness of the Article 6(b) language enables the producers to claim reimbursement for more production related taxes than they actually pay. Contrary to the briefs of respondents[5], these facts were inexplicably ignored by the court of appeals below.

2. *Federal Public Policy.* Kerr-McGee and Phillips argue (at p. 7) that "the Court of Appeals' analysis of federal public policy is fully in accord with . . . other decisions within the Tenth Circuit" and cite, as an example, *Amoco Production Co.* v. *Kansas Power & Light Co.*, 505 F. Suppl. 628 (D. Kan. 1980). Respondent Amoco cites page 639 of the same decision (at pp. 10-11) for the proposition that "pricing concepts such as vintaging, small producers' incentives and the like are irrelevant to the issues presented on appeal." But there is no mention at all of "vintaging" or "small producers' incentives" at 505 F. Supp. at 639. What *is* presented there is a discussion of the Wyoming District Court's decision in the present case (*Kerr-McGee Corp.* v. *Northern Utilities, Inc.*, 500 F. Supp. 628 (D. Wyo. 1980) and an explanation of why the Kansas District Court reached a different

[5] Amoco Brief, p. 5; Kerr-McGee and Phillips Brief, p. 8.

result in approving the favored nations clause which was before it in *Amoco* v. *KP&L:*

> ". . . Since all of the gas provided by Northern Utilities' contracts was intrastate, they were not subject to federal price controls. If the relevant federal price controls applied, then the quoted price escalation clause would not have been triggered, since none of the defendant producers qualified as 'small producers' . . . and all of the gas supplied the plaintiff came from wells drilled prior to 1973.
>
> "Unlike KP&L, Northern Utilities agreed to pay the price escalations demanded by the gas producers until it could either work out a settlement or obtain a court decision on the price question. *Id* at 631-32. The effect of the price escalation for the customers of Northern Utilities, Inc. was dramatic. Between December, 1975, and April, 1980, a period of slightly over four years, the price rose from 28¢/MCF to $2.80/MCF. This represented a ten-fold increase over what would have been the contract price for the gas." (505 F. Supp. at 628-629.)

In distinguishing the facts in *Northern Utilities* from the facts before it, the Kansas District Court stated that "this Court does not disagree with the findings in that case given the circumstances presented there" (505 F. Supp. at 629), citing, in particular, the following:

> —in *Northern Utilities* "the gas producers alone supplied the problematic escalator clause" (while KP&L "had substantial input" in the drafting of the clause in its contract).
>
> —"the price increase for KP&L amounts to slightly more than a two and one-half fold escalation" compared with the "dramatic" ten-fold increase in *Northern Utilities*.
>
> —The KP&L escalation clause was activated for less than a year and a half while in *Northern Utilities* the clause "would have operated for twenty years . . . or

> until 1985 if the Natural Gas Policy Act of 1978 should operate to deregulate the price of gas under the contract."

This discussion in *KP&L* underscores the fundamental point that decisions in other cases involving more limited favored nations clauses do not support the result reached by the Court of Appeals in the present case.

3. *Wyoming Public Policy.* The Briefs in Opposition argue that the *amicus* participation of the State of Wyoming "cannot constitute the public policy of a state."[6] This ignores the mandate under Wyoming law by which the Attorney General is "required to attend to the interests of the state in all suits, actions or claims in which the state is or may become interested . . . in any of the United States courts."[7] The people of the State of Wyoming had a right to be heard in this proceeding, and the Attorney General was their appropriate spokesman. Indeed, in a Tenth Circuit case often relied on by Respondents, the *amicus* support of the indefinite price escalator clause there at issue by the state regulatory body was a material consideration of the court. *Superior Oil Co.* v. *Western Slope Gas Co.*, 604 F.2d 1281, 1285-86 (10th Cir. 1979). The *amicus* participation of the State of Wyoming in this case is not a "bootstrapping ploy" to establish Wyoming public policy, as argued by Respondents[8], and should not be dismissed by the Federal courts as a meaningless and empty act.[9]

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[6] Brief of Kerr-McGee and Phillips, p. 12. See also Brief of Amoco at p. 9.

[7] Wyoming Statutes, § 9-2-505 (1977).

[8] Brief of Amoco, p. 9.

[9] If there is any "bootstrapping" of the public policy issue being attempted in this case, it is by the producers as respects federal

Finally, the beneficiaries of the ten-fold price increase in Beaver Creek gas argue that this dramatic leap in price for 85% of Northern's gas supply somehow did not trickle down to the consumer. They argue that the increase in a typical residential consumer's monthly bill from $30 in 1975 to between $285 and $300 in 1980 was merely hypothetical and that in fact the 1980 figure is only $46.50.[10] While the $46.50 figure may represent the annual average, the testimony makes clear that the *wintertime* gas bill in 1980 was between $285 and $300.[11] The fact that a ten-fold increase in the price of Beaver Creek gas has resulted in an eight to nine-fold increase in consumers' bills cannot be denied. And if the Beaver Creek price had not been regulated at the time of trial, the typical consumers' wintertime bill would have been between $520 and $530 per month.[12]

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public policy. They argue that the courts should stand aside and permit Article 6(b) to escalate up to its "statutory ceiling." (Brief of Kerr-McGee and Phillips, p. 6. See also Brief of Amoco at p. 9) One is led to believe that the Congress, in its wisdom, has prescribed a precise price level consistent with federal policy. The Congress has done no such thing. Under the NGPA, the "maximum lawful price" for Beaver Creek gas is the *lesser* of the "new" gas price or *the price under the contract itself*. Natural Gas Policy Act of 1978, Section 105(b)(1); 15 U.S.C. § 3315(b)(1). If Article 6(b) is void, as the district court determined, then the statutory ceiling is the price under the remaining terms of the contract. That price, as the statutory ceiling, would then represent the federal policy as argued by the producers.

[10] Brief of Kerr-McGee and Phillips, p. 13.

[11] Tr. 339.

[12] Tr. 341.

4. *Ratification by Kerr-McGee and Phillips.* The contention by Kerr-McGee and Phillips that "[t]he evidence of bargaining conduct introduced against Amoco was expressly excluded from evidence introduced against Kerr-McGee and Phillips"[13] does not stand scrutiny. In fact, the objection of Kerr-McGee and Phillips was overruled.[14] The district court's findings reflect that Kerr-McGee and Phillips *ratified* the negotiations which Amoco had concluded: "Both Phillips and Kerr-McGee ratified the 1957 Amoco Contract without negotiations with Northern."[15] Not having negotiated with Northern on their own behalf, Kerr-McGee and Phillips must be judged in the same light as Amoco.

CONCLUSION

For the reasons stated above and in Northern Utilities' original petition the requested writ of certiorari should be granted.

Respectfully submitted,

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[13] Brief of Kerr-McGee and Phillips, p. 10, footnote 9.

[14] Tr. 263. The Court's reference to Rule 104 of the Federal Rules of Evidence is at best ambiguous. Any ambiguity is made clear in the Court's finding.

[15] Finding 12, Petition, p. 25a.